FH [redacted]

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

Winnebago County Department of Human Services,
Petitioner

v.

[redacted], Respondent

DECISION

FOF/171484

PRELIMINARY RECITALS

Pursuant to a petition filed January 15, 2016, under Wis. Admin. Code §HA 3.03, and see, 7 C.F.R. § 273.16, to review a decision by the Winnebago County Department of Human Services to disqualify [redacted] from receiving FoodShare benefits (FS) for a period of ten years, a hearing was held on March 1, 2016, at Oshkosh, Wisconsin.

The issue for determination is whether the respondent committed an Intentional Program Violation (IPV).

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

Department of Health Services
Division of Health Care Access and Accountability
1 West Wilson Street, Room 651
Madison, Wisconsin 53703
By: [redacted], Fair Hearing Coordinator
Winnebago County Department of Human Services
220 Washington Ave.
PO Box 2187
Oshkosh, WI 54903-2187

Respondent:

[redacted]

ADMINISTRATIVE LAW JUDGE:
Mayumi M. Ishii
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [redacted]) received FoodShare benefits from July 2014 through January 2015. The last disbursement took place on December 19, 2014. (Exhibit 6)

2. On January 25, 2016, the agency prepared an Administrative Disqualification Hearing Notice alleging that between July 1, 2014 and January 31, 2015, the Petitioner lied about her residence in order to receive dual benefits. (Exhibit 1)

DISCUSSION

Respondent's Non-appearance

The Respondent did not appear for this hearing. This circumstance is governed by the regulation in 7 C.F.R. §273.16(e)(4), which states in part:

> **If the household member or its representative cannot be located or fails to appear at a hearing initiated by the State agency without good cause, the hearing shall be conducted without the household member being represented.** ***Even though the household member is not represented, the hearing official is required to carefully consider the evidence and determine if intentional Program violation was committed based on clear and convincing evidence.*** If the household member is found to have committed an intentional program violation but a hearing official later determines that the household member or representative had good cause for not appearing, the previous decision shall no longer remain valid and the State agency shall conduct a new hearing. The hearing official who originally ruled on the case may conduct a new hearing. In instances where the good cause for failure to appear is based upon a showing of nonreceipt of the hearing notice, the household member has 30 days after the date of the written notice of the hearing decision to claim good cause for failure to appear. In all other instances, *the household member has 10 days from the date of the scheduled hearing to present reasons indicating a good cause for failure to appear. A hearing official must enter the good cause decision into the record.*
>
> *Emphasis added*

The hearing in this case took place on March 1, 2016. The Respondent was advised of the date and time of the hearing, in an Administrative Disqualification Hearing Notice. The agency failed to write in the address to which it sent the notice. However, [redacted] testified that the notice was sent to the Respondent along with the agency's packet to an address on [redacted] in Chicago, via certified mail. [redacted] testified that this was the Respondent's last known address, based upon Illinois [redacted] records.

It should be noted that [redacted] testified that she called the Respondent at [redacted] on January 19, 2016, and was able to speak to the Respondent. [redacted] testified that the Respondent refused to provide her current address. [redacted] indicated that the packet was returned, because no one picked it up from the post-office.

Since the Respondent did not get the notice, she did not provide a phone number where she could be reached for the hearing. An attempt was made to reach her at [redacted]. A woman answered and when I asked to speak to the Respondent, the woman asked who was calling. She then stated it was the wrong number. I asked if it was the wrong number, why she asked who was calling. The woman eventually identified herself as the Respondent's sister, [redacted], and indicated that the Respondent and she live in Chicago, but [redacted] refused to verify the Respondent's address. A message was left for the Respondent advising her that the hearing would proceed in her absence, that the agency sought to

disqualify her from the FoodShare program for a period of ten years, that the sanction applies wherever she goes in the United States and that she should call me within ten days, if she had a good reason for not being available for the hearing, otherwise I would issue a decision based upon the record created at the hearing that day.

The Respondent did not contact the Division of Hearings and Appeals within ten days of the hearing to explain her absence. Accordingly, it is found that she did not have good cause for her failure to appear.

The Definition of an Intentional Program Violation

An intentional program violation of the FoodShare program occurs when a recipient intentionally does the following:

1. makes a false or misleading statement, or misrepresents, conceals or withholds facts; or
2. commits any act that constitutes a violation of the Food Stamp Act, the Food Stamp Program Regulations, or any Wisconsin statute for the purpose of using, presenting, transferring, acquiring, receiving, possessing or trafficking of FoodShare benefits or QUEST cards.

7 C.F.R. § 273.16(c); *see also* Wis. Stat. §§ 946.92(2).

The Department's written policy restates federal law, below:

3.14.1 IPV Disqualification
7 CFR 273.16
A person commits an Intentional Program Violation (IPV) when s/he intentionally:
1. makes a false or misleading statement, or misrepresents, conceals or withholds facts; or
2. commits any act that constitutes a violation of the Food Stamp Act, the Food Stamp Program Regulations, or any Wisconsin statute for the purpose of using, presenting, transferring, acquiring, receiving, possessing or trafficking of FoodShare benefits or QUEST cards.

An IPV may be determined by the following means:

1. Federal, state, or local court order,
2. Administrative Disqualification Hearing (ADH) decision,
3. Pre-charge or pretrial diversion agreement initiated by a local district attorney and signed by the FoodShare recipient in accordance with federal requirements, or
4. Waiver of the right to an ADH signed by the FoodShare recipient in accordance with federal requirements.

FoodShare Wisconsin Handbook, §3.14.1.

The agency may disqualify only the individual who either has been found to have committed the IPV or has signed a waiver or consent agreement, and not the entire household. If disqualified, an individual will be ineligible to participate in the FS program for one year for the first violation, two years for the second violation, and permanently for the third violation. However, any remaining household members must agree to make restitution within 30 days of the date of mailing a written demand letter, or their monthly allotment will be reduced. 7 C.F.R. §273.16(b).

What is the County Agency's Burden of Proof?

In order for the agency to establish that an FS recipient has committed an IPV, it has the burden to prove two separate elements by clear and convincing evidence. The recipient must have: 1) committed; and 2) intended to commit an intentional program violation per 7 C.F.R. §273.16(e)(6).

"Clear and convincing evidence" is an intermediate standard of proof which is more than the "preponderance of the evidence" used in most civil cases and less than the "beyond a reasonable doubt" standard used in criminal cases.

In Kuehn v. Kuehn, 11 Wis.2d 15, 26 (1959), the court held that:

> Defined in terms of quantity of proof, reasonable certitude or reasonable certainty in ordinary civil cases may be attained by or be based on a mere or fair preponderance of the evidence. Such certainty need not necessarily exclude the probability that the contrary conclusion may be true. In fraud cases it has been stated the preponderance of the evidence should be clear and satisfactory to indicate or sustain a greater degree of certitude. Such degree of certitude has also been defined as being produced by clear, satisfactory, and convincing evidence. Such evidence, however, need not eliminate a reasonable doubt that the alternative or opposite conclusion may be true. In criminal cases, while not normally stated in terms of preponderance, the necessary certitude is universally stated as being beyond a reasonable doubt.

Wisconsin Jury Instruction – Civil 205 is also instructive. It provides:

> Clear, satisfactory and convincing evidence is evidence which when weighed against that opposed to it clearly has more convincing power. It is evidence which satisfies and convinces you that "yes" should be the answer because of its greater weight and clear convincing power. "Reasonable certainty" means that you are persuaded based upon a rational consideration of the evidence. Absolute certainty is not required, but a guess is not enough to meet the burden of proof. This burden of proof is known as the "middle burden." The evidence required to meet this burden of proof must be more convincing than merely the greater weight of the credible evidence but may be less than beyond a reasonable doubt.

Further, the *McCormick* treatise states that "it has been persuasively suggested that [the clear and convincing evidence standard of proof] could be more simply and intelligibly translated to the jury if they were instructed that they must be persuaded that the truth of the contention is highly probable." 2 *McCormick on Evidence* § 340 (John W. Strong gen. ed., 4th ed. 1992.

Thus, in order to find that an IPV was committed, the trier of fact must derive from the evidence, a firm conviction as to the existence of each of the two elements even though there may exist a reasonable doubt that the elements have been proven.

The Merits of the County Agency's Case

In the case at hand, the agency asserts that the Respondent violated the rules of the FoodShare Program by lying about her residence between July 1, 2014 and January 31, 2015, in order to receive food stamp benefits from Wisconsin and Illinois.

"A household shall live in the State in which it files an application for participation" in the food stamp program. *7 CFR §273.3(a)*

Per 7 C.F.R. §273.16(b)(5), "an individual found to have made a fraudulent statement or representation with respect to the identity or place of residence of the individual in order to receive multiple food stamp

benefits simultaneously shall be ineligible to participate in the Program for a period of 10 years." *See also FoodShare Wisconsin Handbook, § 3.14.12*

Simply receiving dual benefits does not trigger a ten year penalty. There must be evidence that the individual either lied about her identity or lied about her residence.

In order to prove its allegation, the agency must show:

A. That the Respondent received a penalty warning
B. What address that Respondent reported as her residence in her application / SMRF
C. That the reported address was false
D. That Respondent received benefits in Wisconsin
E. That Respondent received benefits in Illinois

The agency has not met its burden to prove the alleged intentional program violation.

First, the Federal Regulations under 7 C.F.R. §273.2(b)(ii), states that, "Each application form shall contain…In prominent and boldface lettering and understandable terms a description of the civil and criminal provisions and penalties for violations of the Food Stamp Act." The agency has provided no evidence that the Respondent received the required penalty warning. The Respondent cannot intentionally violate a rule without first having been given notice of the rule and the consequences of breaking that rule.

Second, the agency did not provide any application, six month report forms, or case comments to establish what the Respondent actually reported to the agency. If there is no evidence of what she reported, there is no way to know whether she lied about her residence to Wisconsin.

Third, the agency did not provide an application or other reliable documentation from Illinois to establish what the Respondent might have reported to Illinois and when. If there is no evidence of what she reported, there is no way to know whether she lied about her residence to Illinois. In addition, depending upon when she moved to Illinois and when she completed her applications / six month report forms, she might not have lied about her residence in those documents.

Fourth, the agency did not provide sufficient evidence to show the Respondent received benefits in Illinois. The only evidence that the Respondent received benefits in Illinois is an e-mail, from an individual whose name is unknown. There is nothing about that e-mail that makes it particularly reliable. Further, there is nothing in the e-mail from Illinois that identifies the Respondent, so there is no way to know whether the person to whom the Illinois agency was referring to, was the same person that Wisconsin made an inquiry about. The agency did not provide any regularly kept business records from the Illinois Department of Health and Human Services, to show that the Respondent received benefits there.

It is possible that the Respondent lied about whether she was receiving benefits in another jurisdiction, which would warrant a lesser penalty, but again, without reliable documentation from the foreign jurisdiction showing she got benefits there, the agency can't prove this. Nor, can the agency prove this, because it did not provide any applications or renewals showing that that the Respondent denied getting benefits in another state.

The agency has complained vehemently, because it was not allowed to submit, post hearing, the Respondent's Wisconsin EBT card usage, showing it was used exclusively in Illinois. However, it never included the document in its original charge and summary of evidence, and at IPV hearings, which often proceed without Respondents, the Respondents get no opportunity to review and respond to

documentation submitted post hearing. The agency should note, that an EBT card usage print out, ultimately would not have mattered, because, as discussed above, the agency's case falls short in many other ways.

The agency should not be going forward with an IPV disqualification, unless it has all off the necessary documentation prepared at the time it issues the notice. There should be no need to hold the record open for the basic documents that were missing here. Indeed, other county agencies provide these documents routinely, with perhaps the regrettable exception of applications and SMRFs from foreign jurisdictions.

The agency's frustration with this case is understandable, given that the Respondent has been so obstructive. However, the Division of Hearings and Appeals cannot sustain an IPV determination when the agency does not provide reliable evidence to do so.

CONCLUSIONS OF LAW

The agency has not met its burden to prove, by clear and convincing evidence, that the Respondent committed an IPV by lying about her residence to get dual benefits.

THEREFORE, it is ORDERED

That IPV case number [redacted] is hereby reversed.

REQUEST FOR A REHEARING ON GROUNDS OF GOOD CAUSE FOR FAILURE TO APPEAR

In instances where the good cause for failure to appear is based upon a showing of non-receipt of the hearing notice, the respondent has 30 days after the date of the written notice of the hearing decision to claim good cause for failure to appear. See 7 C.F.R. sec. 273.16(e)(4). Such a claim should be made in writing to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875.

APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be served and filed with the appropriate court no more than 30 days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

For purposes of appeal to circuit court, the Respondent in this matter is the Department of Health Services. After filing the appeal with the appropriate court, it must be served on the Secretary of that Department, either personally or by certified mail. The address of the Department is: 1 West Wilson Street, Room 651, Madison, Wisconsin 53703. A copy should also be sent to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for appeals to the Circuit Court is in Wis. Stat. §§ 227.52 and 227.53.

Given under my hand at the City of Milwaukee,
Wisconsin, this 15th day of March, 2016

\sMayumi M. Ishii
Administrative Law Judge
Division of Hearings and Appeals

State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

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The preceding decision was sent to the following parties on March 15, 2016.

Winnebago County Department of Human Services
Public Assistance Collection Unit
Division of Health Care Access and Accountability
[redacted]@co.winnebago.wi.us